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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TRUDIE P. WESTMORELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Section 666(b) of Title 18 of the United States Code requires a misuse of Federal funds and a taking in excess of $5,000.00 and further, whether the ambiguity of the statute renders it unconstitutional. (This is an important question of federal law which has not been, but should be, settled by this Court.)

2. Whether rebuttal testimony offered by the government of an "on-going investigation" of alleged prior misconduct on the part of a Defendant is admissable. (The decision rendered by the Fifth Circuit Court of Appeals is in conflict with a decision of another Federal Court of Appeals on the same issue.)

3. Whether hearsay evidence is admissible as proof of predisposition and whether evidence to prove guilt by association is harmless error. (The Lower Court of Appeals rendered a decision on this point which is in conflict with previous decisions of the Fifth Circuit as well as other Federal Courts of Appeal.)

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No.

IN THE

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TRUDIE P. WESTMORELAND,
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United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

The Petitioner, Trudie P. Westmoreland, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, Cause No. 87-4515, slip Opinion at 2647, officially reported as *United States v. Westmoreland,* ____ F.2d ____ (5th Cir. 1988), handed down by the United States Court of appeals for the Fifth Circuit on March 23, 1988. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is appended, bound in the Appendix and marked as Exhibit "A".

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Section 666(b) of Title 18 of the United States Code requires a misuse of Federal funds and a taking in excess of $5,000.00 and further, whether the ambiguity of the statute renders it unconstitutional. (This is an important question of federal law which has not been, but should be, settled by this Court.)

2. Whether rebuttal testimony offered by the government of an "on-going investigation" of alleged prior misconduct on the part of a Defendant is admissible. (The decision rendered by the Fifth Circuit Court of Appeals is in conflict with a decision of another Federal Court of Appeals on the same issue.)

3. Whether hearsay evidence is admissible as proof of predisposition and whether evidence to prove guilt by association is harmless error. (The Lower Court of Appeals rendered a decision on this point which is in conflict with previous decisions of the Fifth Circuit as well as other Federal Courts of Appeal.)

REFERENCE TO OPINIONS

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit from which this appeal is taken is bound and marked in the Appendix as Exhibit "A". In addition the Motion to Dismiss the indictment filed in the District Court and the Order entered thereon is also included in said Appendix and marked as Exhibit "B" and Exhibit "C". Relevant portions of testimony are attached to the Appendix as Exhibits "D" and "E".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1988. Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1254. Jurisdiction was vested in the Court of Appeals for the Fifth Circuit by virtue of Title 23 U.S.C. Section 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions which are relevant to the decision of this case are the Fifth and Sixth Amendments of the United States Constitution.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against themselves, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 666 of Title 18 of the United States Code provides as follows:

(a) Whoever, being an agent of an organization, or a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or other form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000.00 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000.00 or an amount equal to twice that which was obtained in violation of this subsection, which ever is greater, or both so imprisoned and fined.

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or oganization other than his employer or principal for or because of recipients conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than 10 years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined."

STATEMENT OF THE CASE

Petitioner, Trudie P. Westmoreland, was indicted by the Federal Grand Jury on March 9, 1987 in the Southern District of Mississippi for the alleged crimes of bribery, mail fraud, extortion and aiding and abetting an offense against the United States during the time that she was serving as Supervisor of Perry County, Mississippi. Motion to Dismiss the Indictment was filed April 6, 1987. An Amended Motion to Dismiss was filed on April 28, 1987 and without hearing, the Motion was overruled.

The Government's case hinged upon the testimony of Government Agent Jerry King who posed as a salesman for Mid-State Pipe and Supply Company in an effort to engage Westmoreland as Supervisor of Perry County, Mississippi, in an illicit kickback scheme as part of an overall sting operation called "Operation Pretense". Westmoreland relied upon the defense of entrapment. She had been a Supervisor approximately two months before being approached by Agent King.

During the trial, testimony was elicited by the government regarding another indicted supervisor named Junie Mixon and over continuous timely objection of defense counsel, evidence was introduced to show that Mixon was a friend of Petitioner Westmoreland and that Mixon took kickbacks. Agent King was allowed to testify that Mixon (allegedly) insinuated that Petitioner Westmoreland would take kickbacks, although defense counsel objected on the grounds of hearsay. The Government was allowed to introduce evidence that Supervisor Mixon wrongfully used County funds to pave a private road to his residence.

The Government, in rebuttal, called an auditor from the State of Mississippi who testified that an on-going investigation was being conducted regarding Petitioner Westmoreland's financial records during her administration as Justice Court Judge four to six years prior in time to the trial and she alleged thousands of

dollars were unaccounted. She admitted the audit was incomplete and Petitioner had not been formally notified, charged or given the opportunity to respond to those charges.

On June 2, 1987, the jury convicted Westmoreland on all six counts of the indictment. Petitioner thereafter timely filed a Motion for Arrest of Judgment and a Motion for Judgment of Acquittal or in the alternative, a Motion for New Trial which was overruled by the District Court on July 6, 1987. Westmoreland's Notice of Appeal to the Court of Appeals for the Fifth Circuit was entered on the 6th day of July 1987 and a decision was rendered by this Court on March 23, 1988.

The questions addressed by the Fifth Circuit Court of Appeals, which are likewise to be addressed in the instant Appeal, concern jurisdiction and constitutionality of Section 666(b) of Title 18 of the United States Code; the admissibility of an ongoing incomplete investigation concerning remote prior misconduct of Petitioner as rebuttal evidence; and the admissibility of hearsay testimony to prove predisposition and guilt by association. The latter two issues were raised only at trial when the evidence was sought to be introduced by the government. However, the jurisdictional issue under Section 666(b) of Title 18 of the United States Code was initially addressed in the Motion to Dismiss and was passed on by the District Court and the Order, which are both attached to the Appendix as Exhibits "B" and "C".

ARGUMENT FOR GRANTING THE WRIT

Petitioner believes this case furnishes the Court distinct and important federal issues not yet settled and which must be resolved in order to protect the constitutional rights of the Petitioner herein and others similarly situated in this Sting Operation. It further involves rulings made by the Fifth Circuit in direct conflict with previous decisions and decisions of other circuits.

The Petitioner in Point I asserts that Section 666(b) of Title 18 of the United States Code entitled "Theft or Bribery Concerning Federal Programs Receiving Federal Funds" requires a tracing of federal funds and must involve a bribery of more than $5,000.00. It is undisputed that Petitioner received less than $5,000.00 and none of the transactions involved federal funds.

The Legislative history of this new statute indicates that it was created to establish new offenses to assist the United States in the vindication of *significant* acts of theft, fraud, and bribery involving *federal* funds that are disbursed to private organizations or State or local governments pursuant to a federal program. The Court of Appeals for the Fifth Circuit in this case of first impression has ruled that the statute does not require involvement of federal funds; that the United States was not required to trace federal funds to the charged transactions (only State funds were utilized here); and the Court did not directly address the question of whether or not the statute required a taking of at least $5,000.00. It is the position of the Petitioner that this is an *extremely* important question of federal law which has not been, but should be settled by this Court because of the precedent it will set for other cases which are bound to come. Furthermore, Petitioner believes that the statute itself is unconstitutionally vague and ambiguous in that it is capable of more than one interpretation and should in any event be resolved in Petitioner's favor.

Point II of Petitioner's Argument addresses an issue concerning rebuttal testimony offered by the Government concerning an "on-going investigation". See Appendix Exhibit "D". The Fifth Circuit Court of Appeals held that even though a State Auditor's Investigation had not been completed it was admissible as rebuttal testimony. This position is in direct conflict with the decision of the Court of Appeals in the Tenth Circuit in *United States v. Biswell,* 700 F.2d 1310 (10th Cir. 1983) which held that rebuttal testimony regarding "on-going investigations" is inadmissible evidence prohibited by Rule 404(a) of the Federal Rules of Evidence.

Point III of Petitioner's Argument involves the introduction of hearsay evidence as proof of predisposition and the introduction of evidence to prove guilt by association. See Appendix Exhibit "E". During Westmoreland's trial, FBI Agent King was allowed to give hearsay testimony of what another indicted Supervisor told him concerning Westmoreland. The testimony was submitted by the government under the guise of proof of predisposition. Mixon was not a witness at the trial and therefore Petitioner was denied her constitutional right to confront and examine all witnesses against her. The Court of Appeals held that the evidence concerning Supervisor Mixon was admissible. Petitioner believes the ruling is in direct conflict with previous decisions rendered by the Court of Appeals for the Fifth Circuit which have consistently held that guilt by association evidence will not be tolerated and hearsay evidence will not be admitted to prove disposition.

ARGUMENT

I.

THE LOWER COURT OF APPEALS ERRED IN FINDING THAT THE DISTRICT COURT HAD JURISDICTION UNDER SECTION 666(b) OF TITLE 18 OF THE UNITED STATES CODE WITHOUT THE REQUISITE USE OF FEDERAL FUNDS AND WITHOUT A BRIBERY IN EXCESS OF $5,000.00.

Section 666 of Title 18 of the United States Code is entitled "Theft or Bribery Concerning Programs Receiving Federal Funds" and states as follows:

> (a) Whoever, being an agent of an organization, or a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or other form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000.00 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000.00 or an amount equal to twice that which was obtained in violation of this subsection whichever is greater, or both so imprisoned and fined.
>
> (b) Whoever, being an agent of an organization, or of the State of local government agency described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of recipients conduct in any transaction or matter or a series of transactions or matters involving $5,000.00 or more concerning the affairs

> of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000.00 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater or both so imprisoned and fined.

The Fifth Circuit Court of Appeals held that the Federal Statute did not require direct involvement of Federal funds in the allegedly corrupt transactions nor was the Government required to trace Federal funds to the tainted transactions. It further found the statute to be unambiguous.

Petitioner asserts that this statute was never intended to reach the factual situation in the case at bar. It is undisputed that counties of Mississippi receive Federal assistance. However, it is equally undisputed, that there were no Federal funds utilized in any of the transactions and further that the amount Petitioner received by virtue of the "bribery" was only approximately $2,000.00. Therefore, this Court, as was pointed out to the Fifth Circuit Court of Appeals by the Petitioner, is confronted with a defendant who allegedly obtained less than $5,000.00 of State, not Federal funds. The United States does not have oversight jurisdiction of State funds.

The Fifth Circuit Court of Appeals relied heavily upon *United States v. Smith,* 659 F. Supp. 833 (S.D. Miss. 1987) where United States District Judge, Honorable William Barbour, found that Section 666(b) of Title 18 of the United States Code only required that $10,000.00 of Federal funds be provided to a given county and that $5,000.00 of funds be involved in the series of transactions charged (whether or not the funds involved were in fact federal and whether or not more than $5,000.00 was received by the person charged). Petitioner respectfully submits that this interpretation, accepted by the Fifth Circuit Court of Appeals in the Westmoreland decision, is in error.

Section 666 of Title 18 of the United States Code was adopted on October 12, 1983 and created a new category of federal crimes for theft or bribery concerning programs receiving federal funds. The section was added in the enactment of Public Law 98-8-473, part (C) which sets forth that the new category of federal crimes was intended to apply only to *federal* monies. Page 369 of Public Law 98-463, part (C) makes it clear that this part of Title XI was created to establish new offenses to assist the United States in the vindication of significant acts of theft, fraud and bribery involving *federal* monies that are disbursed to private organizations or State and local governments pursuant to a federal program.

The title of the statute and the legislative history reveal the intent of Congress to reach only "significant acts of theft, fraud, and bribery involving *federal* monies. The legislative history further reveals that it was the intent of Congress to reach thefts and briberies in situations of the type found in *United States v. Deltoro,* 513 F.2d 656 (2nd Cir. 1975); *United States v. Hinton,* 683 F.2d 195 (7th Cir. 1982); *United States v. Moseley,* 659 F.2d 812 (7th Cir. 1981). See 4 *U.S. Congressional and Administrative News,* 3510 (1984). All of these cases involved the use of federal funds in various schemes of bribery. None of these cases involved the use of State or local funds in bribery schemes comparable to that alleged in the indictment exhibited against the Petitioner.

In 1984 *U.S. Congressional and Administrative News,* page 3511, Section 666 was discussed as follows:

> "Part (C) adds a new Section 666 to Title 18, United States Code. Subsection (a) makes it a federal crime for an officer, employee or agent of an organization or of a State or local government agency that receives benefits in excess of $10,000.00 per calendar year pursuant to a federal program to *steal, embezzle, obtain by fraud, willfully misapply or otherwise knowingly convert without authority pro-*

> *perty valued at $5,000.00, or more...* the committee intends that the term 'federal program involving a grant, a contract, a subsidy, a loan, a guaranty, insurance, or other form of federal assistance' be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud and undue influence by *bribery*. However the concept is not unlimited. The term 'federal program' means that there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000.00 in equipment from a supplier, *it is not the intent of this section to make a theft of $5,000.00 or more, from the supplier a federal crime.* It is, however the intent to reach the thefts and bribery in those situations of the types involved in the *Deltoro, Hinton* and *Moseley* cases cited herein." (Emphasis added).

This clearly outlines the intent of Congress to cover thefts of property "valued at $5,000.00 or more" and does not contemplate nonsignificant thefts of less than $5,000.00. The instant case and many of the supervisor cases arising out of "Operation Pretense" involve thefts or bribery of less than $5,000.00.

It is necessary that this Court make note of the fact that the funds involved in the case at bar had nothing to do with the federal funds received by Perry County which were Federal Revenue Sharing Funds and which were maintained separately in a fund account in accordance with 331 C.F.R. 51.101(a), (b), (c). This is undisputed. The Government's contention, however, is that the series of transactions can be combined to reach the $5,000.00 mark and that it is unnecessary to show that the Petitioner actually received $5,000.00 or more. In addition, it is the Government's position that no tracing of federal funds

to the charged transactions is necessary. This position, which was accepted by the Fifth Circuit Court of Appeals is directly contrary to congressional intent outlined in 4 *U. S. Congressional and Administrative News,* 3510-3511, (1984).

It is furthermore the belief of Petitioner that the statute is so vague and ambiguous that it does not meet constitutional muster. Paragraph (a) clearly requires the conversion of $5,000.00 or more. We believe (b) also requires the conversion of $5,000.00 or more because of congressional intent but the language of the statute itself is at the very least capable of two interpretations. Petitioner argues that the requisite amount of $5,000.00 refers to the property taken and cannot consist of smaller transactions added together as proposed by the government. This equally suggests that the language of the statute gives rise to more than one interpretation and the very fact that the statute can be construed in more ways than one places a constitutional shadow over this conviction. *Vicksburg Fire Fighters Association v. City of Vicksburg,* 761 F.2d 1036, footnote 7 (5th Cir. 1985).

A strict standard should be applied in the review of criminal statutes for vagueness. *United States v. Articles of Drug et al,* 825 F.2d 1238 (8th Cir. 1987). One District Court Judge has already found in the case of *United States v. Jackowe,* 651 F.Supp. 1035 (S.D.N.Y. 1987), although factually distinguishable, that Section 666 of Title 18 of United States Code is capable of two constructions and therefore should be construed against the government in accordance with *United States v. Barquin,* 799 F.2d 619 (10th Cir. 1986).

Even if this Honorable Court should find that the statute is constitutional in and of itself, the ambiguity arising therefrom should most definitely be resolved in favor of the rule of leniency which is based upon due process principles and which requires that no person have to speculate at whether or not conduct is prohibited. *Gunn v. United States,* 442 U.S. 100, 60

L.Ed.2d 743, 99 S.Ct. 2190 (1979); *United States v. Bass,* 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971); *United States v. Enmons,* 410 U.S. 396, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973); *Rues v. United States,* 401 U.S. 808, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971). All of these cases involved the Governments attempt to give an expansive interpretation to a statute and all were resolved in favor of the Defendant. Petitioner Westmoreland submits that Section 666 of Title 18 of the United States Code is *not* clear and, therefore, the legislative history must be considered. The history reveals the intention of Congress to reach crimes involving Federal monies, not State funds, and bribery or takings of $5,000.00 or more and not less. The case at bar involves State funds and a taking of merely $2,000.00 and therefore the decision of the Fifth Circuit Court of Appeals upholding Westmoreland's conviction should be reversed.

II.

REBUTTAL TESTIMONY REGARDING AN "ONGOING INVESTIGATION" OF PRIOR MISCONDUCT IS INADMISSIBLE AS A VIOLATION OF RULE 404(a) OF THE FEDERAL RULES OF EVIDENCE.

A rebuttal government witness, an investigative auditor of the State of Mississippi, testified that she was conducting an ongoing investigation which was not complete but which had allegedly revealed that Petitioner Westmoreland had approximately $9,000.00 in unaccounted funds from her term as Justice Court Judge four to six years before the trial of the matter at bar. Relevant portions of her testimony are attached to the Appendix as Exhibit "D". The Fifth Circuit Court of Appeals held that even though the investigation had not been completed, the testimony was admissible. That decision flies in the face of the decision rendered by the Court of Appeals for the Tenth Circuit in *United States v. Biswell,* 700 F.2d 1310 (1983)

which held that evidence of an "on-going investigation" was in violation of Rule 404(a) as an attempt to show that a Defendant acted in conformity with a criminal character.

In the case at bar Patterson, the Auditor for the State of Mississippi, testified regarding her on-going investigation and further stated that the petitioner would not have the oppertunity to rebut such a charge until the investigation was complete and she had been sent a letter setting forth the findings. Mrs. Patterson further testified that many times findings, such as hers, could be explained or answered satisfactorily by the person charged and a that the discrepancies complained of occurred from four to six years before. The evidence of this incomplete investigation did not constitute *clear* and *convincing evidence* of other crimes reasonably close in time to that charged at trial. See *United States v. Gustafson*, 728 F.2d 1078 (8th Cir.), *cert denied* 469 U.S. 979 (1984).

In *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983) a defendant was charged with the unauthorized use, acquisition and posession of food stamps. During the trial Federal agents and witnesses were allowed to testify that there were on-going investigations concerning the Defendant's possession of stolen property. The Tenth Circuit Court of Appeals stated as follows:

> "Thus, at different times repeated references were made connecting Biswell with 'on-going investigations' with being 'handled' for possessing stolen property with 'gambling, stolen property, things like that . . .' and he was by implication placed in a group 'involved in some kind of criminal activity' . . ."
>
> "We are convinced that the overall effect of such evidence was to create a prejudicial portrayal of the defendant as a person of a criminal character with a trait of taking part in general criminal activities for an undefined period. For reasons that follow we must hold that admission of such

vague and prejudicial evidence was not justified under Rule 404(b), but was in violation of Rule 404(a) by attempting to show that defendant acted in conformity with a criminal character. In any event, the relevance of any part of such evidence was substantially outweighed by the danger of unfair prejudice when such a vague protrayal of a long term criminal character was injected, and should have been excluded under Rule 403." Id at 1316.

The Court went on to state as follows:

"From the totality of the evidence interjected by the government we are convinced that the admission of the evidence of other crimes, wrongs and misconduct here was prejudicial error. First, we are not dealing with proof clearly establishing an identified, reasonably recent offense of receiving stolen goods, or with any reasonably recent conviction of such an offense. As noted, the evidence was of the most damning sort - referring to "on-going investigations' persons 'involved in the criminal activity' in a general smear of the defendant for participating in 'gambling, stolen property, things like that' . . . the governments approach did not permit any effort by the defendant to meet charges of specific misconduct at any particular time; it could be met only by a general denial and evidence of good character. Moreover the vagueness of the testimony made its reliability questionable and diminished its probative value." Id at 1318.

Like *Biswell*, supra, the testimony in the case at bar was character evidence interjected to prove that Westmoreland had acted in conformity with her criminal character, which is prohibited by Rule 404(a) of the Federal Rules of Evidence. Westmoreland was not given an opportunity to meet these charges and like *Biswell*, supra, all she could do was to rely on her evidence of good character and a general denial of any wrongdoing. The evidence introduced had no relevance to the offense tried, and its predominant quality was to show Defendant's character as a misuser of public funds.

Petitioner respectfully submits that Rule 404(b) of the Federal Rules of Evidence was never intended to allow remote evidence of the kind introduced. There is no doubt it was introduced, in the Government's own words, to show the Defendant's intent to commit the crimes charged in the indictment. The Government wrongfully attempted to show that this Defendant acted in conformance with alleged past criminal behavior. The Fifth Circuit Court of Appeals found that this was acceptable. The Tenth Circuit Court of Appeals in *Biswell*, supra, found that it was not acceptable. Westmoreland believes the Tenth Circuit rendered the correct decision in *Biswell*.

The overwhelming prejudicial nature of testimony concerning "on-going investigations" of prior misconduct is alarming and certainly overcomes any probative value of such testimony. The truth of this type prejudice is revealed where the Government rebuttal witness testified that many times the findings of these on-going investigations can be explained or answered satisfactorily after a party has been formally presented with the report. Petitioner believes that Rule 404(b) was never intended as a carte blanche rubber stamped "okay" on extremely prejudicial evidence with questionable reliability. The Fifth Circuit Court of Appeals itself has held again and again that such testimony should be excluded by a trial court when its value is outweighed by unfair prejudice to the Defendant. *United States v. Johnson*, 542 F.2d 230 (5th Cir. 1976). The prejudice created by Ms. Patterson's testimony of this incomplete and on-going investigation was insurmountable and it should be pointed out that her records changed even during the short time of trial and were still incomplete at the end of trial. Petitioner could not combat the prejudice of this incomplete report and we assure this Court that it brought about Petitioner's prompt conviction, denying her the fair trial to which she was entitled.

III.

HEARSAY EVIDENCE IS NOT ADMISSIBLE TO PROVE PREDISPOSITION AND EVIDENCE TO PROVE GUILT BY ASSOCIATION IS NOT ADMISSIBLE

In the trial before the District Court Judge, Government Agent King gave hearsay testimony of what another indicted Supervisor, Junie Mixon, told him concerning Westmoreland. The testimony was submitted by the Government as proof of predisposition and was an attempt to associate Westmoreland with a friend who had also been indicted and, according to the testimony, had accepted kickbacks. The prejudice created by this testimony was compounded when evidence was admitted of extreme extraneous crimes committed by Supervisor Junie Mixon which had nothing to do with the charges against the Petitioner. The Government was allowed over timely objection to question character witnesses of Petitioner regarding whether or not Supervisor Mixon had paid for the paving of a private road to his residence or whether he had misused County funds to obtain the same. Relevant portions of this testimony are attached to the Appendix as Exhibit "E".

Petitioner argues that she was denied her Sixth Amendment Right to confront all witnesses used against her. Supervisor Mixon was an indicted Supervisor who was not available for trial and who was used, through hearsay, as a witness against her. In the United Supreme Court case of *Moore v. United States*, 429 U.S. 21, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) police officers testified as to what an informant had said about Moore's possession of drugs and ownership of an apartment. This hearsay testimony was the only testimony offered regarding the Defendant's living in the apartment that was in question. This Honorable Court found that introduction of that testimony deprived Moore of his right to cross-examine a crucial witness. Therefore the judgment of the Court of Appeals was vacated and the case remanded.

In the case at bar the hearsay evidence regarding Mixon deprived Westmoreland of her right to cross-examine Mixon and this hearsay evidence was the only evidence offered by the Government to show predisposition without which the jury would have had to find entrapment. It should not have been admitted.

Testimony was elicited by the Government to show that Mr. Mixon and Westmoreland were good friends, setting the stage for the "guilt by association". Testimony was further elicited to show that Mr. Mixon had been accepting kickbacks over the constant objection of Petitioner's counsel who stated that the Government was attempting to bring in other crimes committed by other people into the trial against Westmoreland. Furthermore FBI Agent King was allowed to testify about a conversation he had allegedly had with Supervisor Mixon during which Mixon allegedly told Agent King that Westmoreland was willing to do a wrong. The Fifth Circuit Court of Appeals said that the admission of this evidence caused it "some concern" but was not reversible error. This is in direct conflict of previous decisions rendered by the Fifth Circuit Court of Appeals which have held: (1) hearsay evidence cannot be used to prove predisposition, *United States v. Webster*, 649 F.2d 346 (5th Cir. 1981); and (2) the Government will not be allowed to taint a Defendant's character through "guilt by association". *United States v. Escamilla*, 666 F.2d 126 (5th Cir. 1982); *United States v. Ochoa*, 609 F.2d 198 (5th Cir. 1980); *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982); *United States v. LaBarbera*, 581 F.2d 107 (5th Cir. 1978).

In *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982), the Fifth Circuit condemned the very same type of testimony which was allowed in the case at bar. *Romo*, supra, was a prosecution for possession of cocaine and conspiracy to possess with intent to distribute. During the trial, evidence was admitted concerning the drug convictions of two persons whom Defendant had previous contact. The Fifth Circuit Court of Appeals found

that such evidence was irrelevant and highly prejudicial and was offered merely as an attempt to taint the Defendant's character through "guilt by association". This ruling is extremely important when considering that the Government in the *Romo*, supra, case argued that the testimony was admissible to rebut Defendant's portrayal of himself as an honest businessman. This was precisely the position of the Government in the case at bar which was trying to combat Westmoreland's character witnesses who portrayed her as an honest business woman. Petitioner submits that the "guilt by association" testimony concerning extraneous crimes committed by Supervisor Mixon, an associate, created such prejudicial error that this Honorable Court should reverse her conviction or at the very least grant a new trial. Petitioner urges this Honorable Court to review *Romo*, supra, in its entirety. It was ultimately reversed because of the Trial Court's erroneous admission of testimony based on "guilt by association" and is very similar to the case at bar.

The case of *United States v. LaBarbera*, 581 F.2d 107 (5th Cir. 1978) is another example of the Fifth Circuit's condemnation of a prosecutor's attempt to taint a Defendant's character through "guilt by association". In that case testimony was admitted regarding whether or not the son of a defendant had been arrested for possession of stolen guns and this Honorable Court stated as follows:

> "A conviction of defendant's son on that charge was irrevelant to any issue in this case, let alone a mere arrest. This was a highly prejudicial attempt to taint defendant's character through "guilt by association'." Id. at 109.

The outrageous attempt by the Government in this case at bar, condoned by the Lower Court, is almost identical. Supervisor Junie Mixon had not been convicted of anything. He had been arrested for offenses similar to that charged in the indictment against Westmoreland, but Petitioner has no knowledge that Mixon had even been confronted with any misuse of funds

in the building of the road which led to his house. The only reason the Government attempted to elicit testimony regarding that extraneous matter was to taint the Petitioner's character through "guilt by association".

CONCLUSION

Petitioner respectfully submits that the case at bar does not fall within the purview of Section 666(b) of Title 18 of the United States Code since it in no way involves Federal funds and did not consist of a taking by the Petitioner of $5,000.00 or more.

Petitioner further submits that the rebuttal testimony offered by the Government of "on-going investigations" of the Petitioner's alleged remote prior misconduct during her administration as Justice Court Judge was inadmissible as an attempt to show Defendant acted in conformity with a criminal character in violation of Rule 404(a) of the Federal Rules of Evidence.

Finally Petitioner submits that the hearsay evidence offered by Government Agent King as proof of predisposition was inadmissible and did not constitute harmless error when coupled with the evidence associating Petitioner with another allegedly guilty supervisor. The admission of this testimony denied Petitioner the right to confront all witnesses used against her and denied her the fair trial to which she was entitled.

For all of the reasons cited herein and upon a review of the record and the Appendix submitted herewith, Petitioner verily believes that this Petition for Writ of Certiorari should be granted, and the judgment of the Lower Court and the Fifth Circuit of Appeals which affirmed the convictions of Petitioner should be set aside and the judgment of conviction be reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Alvin M. Binder, attorney of record for the Petitioner, Trudie P. Westmoreland, do hereby certify that I have this day forwarded by the United States Mail, postage prepaid, a true and correct copy of the above and foregoing Petitioner's Petition for Writ of Certiorari to Honorable Charles Freed, Solicitor General of the United States Department of Justice, Washington, D.C. 20530.

This the 18th day of May, 1988.

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ALVIN M. BINDER